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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 556

TURPENTINE & ROSIN FACTORS, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment in the United States District Court, Southern District of Georgia, Savannah Division

JURISDICTIONAL STATEMENT

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v.

THE UNITED STATES OF AMERICA, *Appellee*.

Appeal from Judgment in the United States District Court, Southern District of Georgia, Savannah Division

---

JURISDICTIONAL STATEMENT

1. (a) The opinions delivered in the court below have not been reported.

Appended hereto as Exhibit "A" is a copy of the opinion delivered by the court below upon the rendering of the order appealed from.

Appended hereto as Exhibit "B" is a copy of an earlier opinion and judgment (combined) in the same

case; the judgment being the one, modification of which is being sought by Appellant in this proceeding.

(b) This proceeding is one to modify the judgmen set out in Exhibit "B" hereof, in the manner hereinafter stated.

Modification of the judgment was denied by the court below by order dated July 21, 1960.

This is an appeal from that order, the appeal having been taken pursuant to 15 U.S.C. 29, this being a Sherman Act civil case.

The Notice of Appeal was filed in the court below on September 8, 1960.

(c) The sole question presented on this appeal is whether or not the court below erred in denying Appellant's petition to modify the judgment set out in Exhibit "B" hereof, in the manner requested by Appellant.

(d) A concise statement of the case containing the facts material to the consideration of the question presented, is as follows:

On October 11, 1950 the United States filed in the court below a civil suit against Appellant and seven other defendants, under the Sherman Act.

One of the other defendants was the Savannah Cotton and Naval Stores Exchange, Inc., one was a subsidiary of Appellant and the other five were competitors of Appellant in the Naval Stores factoring business.

The primary purpose of the government's suit was to dissolve the Naval Stores section of the defendant Exchange.

On October 18, 1951, a consent decree was entered in the court below. (Exhibit "B" hereof).

The decree required the Naval Stores section of the defendant Exchange to cease operations within twelve months, unless the decree should be modified in the meantime.

The decree was not modified and the Naval Stores section of the defendant Exchange went out of business at the end of said twelve months period.

The decree (Title VII (c)) also enjoined Appellant and its competitor defendants from buying or selling any naval stores products (rosin or turpentine) on the defendant Exchange.

Said injunction was sought and granted because the chief criticism directed against the Exchange by the Government was that Appellant and its competitor defendants had been permitted by means of "wash" sales on the Exchange, to fix and control the price of crude gum, the raw material out of which rosin and turpentine (called naval stores) are made.

To make sure that this injunction against buying and selling on the Exchange was not violated by defendants, the decree (Title VII (A)) required Appellant and its defendant competitors to report, upon request, to "an independent reporter or service designated by the United States Department of Agriculture such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service."

Further, to protect against collusive or "wash" sales on the defendant Exchange, paragraphs (A) (3) and (B) of Title V were inserted in the decree.

These provisions required all members of the Exchange to report all purchases and sales, if requested in the manner aforesaid.

Under Title X of the decree the court below retained jurisdiction of the case for purposes of modification, termination, enforcement, etc. of the decree.

Pursuant to the provisions of Title X of the decree, Appellant on or about April 15, 1960, some eight and one-half years after the decree was entered, filed its petition in the court below to have the decree modified by eliminating therefrom the compulsory reporting provision contained in Title VII (A), quoted above.

Briefly stated, the facts upon which Appellant relied in its petition for modification of the decree are as follows:

(a) Title VII (A) of the decree has outlived its usefulness because:

(i) The defendant naval stores Exchange has been out of business for many years. There is not now, and has not been since October 18, 1952, anything even remotely resembling a successor Exchange.

(ii) All of the other defendants named in the decree, except Appellant, have long since gone out of business.

(iii) Appellant is the single defendant still in business. But it has many other competitors, who were not defendants and to whom Title VII (A) does not apply. Most of them have gotten into the business since 1951.

(iv) Appellant is thus the only person in the naval stores factoring business who is required to report the details of all of its purchases and sales to the government.

(b) The only legitimate reason for the inclusion of Title VII (A) in the decree originally was to insure against continuation of the abuses on the Exchange which were complained of by the Government.

(c) With the Exchange out of business and all the other defendants except Appellant out of business, the abuses *a fortiori*, are out of business.

(d) But Title VII (A) is now being used to create other abuses under the Sherman Act.

(e) Even though neither the Exchange nor any of the other defendants, except Appellant, are any longer in existence, the Department of Agriculture still required Appellant to report the details of all of purchases and sales, which the Department publishes, and which thus fix, or tend to fix, prices in the field, contrary to the spirit and purpose of the Sherman Act.

(f) Appellant has continued to accede to the reporting demands of the Department of Agriculture only because the decree does not provide, in so many words, that Title VII (A) and Title V (A) (3) & (B) should apply only so long as the Exchange continued in operation.

(g) Appellant is being severely damaged in its business because of the uncompetitive position in which it is placed by this unintended and outmoded use of Title VII (A) of the decree.

(h) Whereas all of its competitors have ready access to all of the details of Appellant's business, Appellant is in the dark as to its competitors' business.

Appellant complained in its petition that this unintended and outmoded use of the provisions of Title VII (A) of the decree was severely damaging Appellant; that because of this it should be stricken from the decree, since it was now being used for a purpose never intended.

After a hearing the court below denied Appellant's petition for modification and this appeal followed.

E. Way Highsmith
Brunswick, Georgia

J. H. Highsmith
Baxley, Georgia

Attorneys for Appellant

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 559

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SAVANNAH COTTON AND NAVAL STORES EXCHANGE, INC.,
TURPENTINE AND ROSIN FACTORS, INC.,
PINE TREE PRODUCTS, INC.,
COLUMBIA NAVAL STORES COMPANY OF HAZELHURST, GEORGIA,
COLUMBIA NAVAL STORES COMPANY OF FITZGERALD, GEORGIA,
COLUMBIA NAVAL STORES COMPANY OF JESUP, GEORGIA, and
COLUMBIA NAVAL STORES COMPANY OF TIFTON, GEORGIA,
Defendants.

Findings of Fact

On October 18, 1951, a Final Judgment was filed in the above-numbered case on consent of the parties. The complaint in the case stated a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act, as amended.

The final judgment reads in part as follows:

"* * *

"VII

Each of the Columbia defendants and T&R defendants is enjoined and restrained from:

(A) Refusing to comply with the request of an independent reporter or service designated by the United States Department of Agriculture for such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service;

(B) Causing, coercing or inducing in any manner, any person to fail to comply or cooperate with the request of an independent reporter or service designated by the United States Department of Agriculture for such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service;

"• • •

"X

Jurisdiction of this action is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and the punishment of violations thereof."

On May 4, 1960, eight years and six months after entry of Judgment, defendant, Turpentine & Rosin Factors, Inc., filed its petition pursuant to the above Section X for an order to modify judgment by striking therefrom Subsections (A) and (B) of Section VII thereof. The petition recites that petitioner is the only one of the defendants in this case now in business, all of the other defendants having long since ceased to operate, and that petitioner has numerous competitors who are not defendants herein and therefore not restrained by Court order from refusing to report such information as to purchases and sales of crude gum, rosin, and turpentine as may be requested by an independent reporter or service designated by the United States Department of Agriculture, and therefore due to this change petitioner is placed at a competitive disadvantage with other naval stores dealers.

Petitioner takes the position that there is not and can not be any dispute between the parties as to the facts but that the only issue between the parties is whether or not there has been since the entry of the judgment herein such a substantial change in circumstances that the necessity of the provisions no longer exists.

On July 5, 1960, the Government filed its Memorandum in Opposition to the petition filed herein. It opposes the petition on the grounds that, first, petitioner failed to state grounds entitling it to the relief requested, or any relief, from said judgment, and second, modification of the judgment, as requested by petitioner, would not be in the public interest and, on the contrary, elimination of Subsections (A) and (B) of Section VII would be contrary to the public interest.

In its memorandum, the Government takes the position that petitioner may not be relieved from the so-called reporting provisions unless there has occurred since entry of judgment such changes in circumstances that the necessity for such provisions no longer exists and that petitioner has not alleged sufficient changes in circumstanges resulting in petitioner suffering an extreme and unexpected hardship to warrant the modification prayed for in the petition.

The petition was set for hearing and was held on July 6, 1960. On that date, petitioner waived that part of its petition requesting the striking of Subsection (B) of Section VII and before proceeding to hearing it was agreed in open court between the Court and respective counsel that the only issue remaining for hearing was the question of whether there has occurred since the entry of the judgment such changes in circumstances that the necessity for the provisions of Subsection (A) of Section VII no longer exists. There-upon witnesses were offered by the petitioner and the Government and exhibits were offered by the Government and admitted by the Court.

I come, therefore, to the question of whether, under the state of record, modification of the judgment would be warranted on the ground that by being the only gum naval stores dealer in the industry subject to the requirement of reporting its purchases and sales of gum naval stores it is subject to such competitive disadvantage as to impose upon petitioner an undue and unreasonable hardship.

Conclusions of Law

The record shows that petitioner has competitors who are not subject to the compulsory reporting provisions of the judgment herein and that petitioner is the only naval stores dealer in the United States who thus is required by law to report the purchase and sales information required by that judgment. At the hearing, testimony was introduced by the petitioner expressing the opinion that some sales of naval stores by petitioner had been lost because of the provisions of reporting of the judgment and that petitioner therefore was placed at a competitive disadvantage; but that if petitioner were released from the compulsion of reporting its purchases and sales of naval stores it would continue to make such reports voluntarily except in those cases where customers request that petitioner refrain from making such report. The record does not reveal any fact from which can be measured the impact or effect upon defendant's volume of sales, profits or ability to compete flowing from the asserted fact that petitioner is the only naval stores dealer required by a judgment to report its purchases and sales information. The mere fact that it may be the only dealer so required does not, ipso facto, entitle petitioner to relief unless that fact is clearly shown to result in "grievous wrong" or undue and unreasonable, financial or competitive hardship to the defendant.

I find the case of *United States* v. *Swift & Company, et al.*, 286 U.S. 106, to be very helpful in my search for guiding precedents.

In this case, which was a Sherman Act case brought by the Government against the leading meat packers in the country, a consent decree was entered on February 27, 1920, and, on April 12, 1930, approximately 10 years and 2 months after the entry of the decree, two of the defendants, Swift & Company, and Armour & Company, and their subsidiaries, filed a petition to modify the consent decree and to adapt its restraints to the needs of a new day. On January 31, 1931, the decree was modified by a lower Court and such modification became the subject of appeal.

Mr. Justice Cardozo delivered the opinion of the Supreme Court on May 2, 1932, and, on page 115, I find the following:

> "Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.
>
> "The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently, and did this with their eyes open. * * *"

and, on page 119, I find the following:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt

> the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The decree modifying the injunction was accordingly reversed.

I am of the opinion that, in view of the tight requirements laid down in the *Swift & Company* case, which are today as applicable as then, as enunciated in the case of *United States* v. *Owens-Corning Fiberglas Corporation, et al.*, 178 F. Supp. 385 (1959), and in view of the record that is before me under this petition, this Court would not be warranted in decreeing a modification so as to strike therefrom the reporting provision applicable to petitioner. Despite the fact that petitioner stresses that it would limit the effects of a modification by continuing to report its purchases and sales to the Naval Stores Marketing News Service on a voluntary basis except when requested otherwise by a customer, I feel that this could not be done without making possible a return of the evils which the judgment herein endeavors to circumvent. A modification that would relinquish the reporting requirements of the judgment therefore would go to the very heart of the prohibitions that were consented to in the judgment and would, in effect, virtually nullify a great portion of it. The petition to modify is denied. An order may be drawn accordingly.

F. M. Scarlett
United States District Judge

July 21, 1960 at
Brunswick, Georgia.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 559

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SAVANNAH COTTON AND NAVAL STORES EXCHANGE, INC., ET AL.,
TURPENTINE AND ROSIN FACTORS, INC.,
PINE TREE PRODUCTS, INC.,
COLUMBIA NAVAL STORES COMPANY OF SAVANNAH, GEORGIA,
COLUMBIA NAVAL STORES COMPANY OF HAZELHURST, GEORGIA,
COLUMBIA NAVAL STORES COMPANY OF FITZGERALD, GEORGIA,
COLUMBIA NAVAL STORES COMPANY OF JESUP, GEORGIA, and
COLUMBIA NAVAL STORES COMPANY OF TIFTON, GEORGIA,
Defendants.

Final Judgment

Plaintiff, United States of America, having filed its Complaint herein on October 11, 1950; defendants having filed their answers to the Complaint denying the substantive allegations thereof; and plaintiff and defendants by their attorneys having severally consented to the entry of this Final Judgment without adjudication of any issue of fact or law herein, and without admission by any defendant in respect of any such issue;

NOW, THEREFORE, before any testimony has been taken herein and without trial or adjudication of any issue of fact or law herein, and upon the aforesaid consent of all parties hereto, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

I

This Court has jurisdiction of the subject matter herein and of all the parties hereto, and the Complaint states a

cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended.

II

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its officers, directors, members, agents, employees, subsidiaries, successors and assigns, any person having a controlling influence in such defendant, and all other persons acting under, through or for such defendant.

III

As used in this Final Judgment:

(A) "Exchange" shall mean Savannah Cotton and Naval Stores Exchange, Inc., a corporation organized and existing under the laws of the State of Georgia;

(B) "Columbia defendants" shall mean defendants Columbia Naval Stores Company of Savannah, Georgia, Columbia Naval Stores Company of Hazelhurst, Georgia, Columbia Naval Stores Company of Fitzgerald, Georgia, Columbia Naval Stores Company of Jesup, Georgia, and Columbia Naval Stores Company of Tifton, Georgia or any of them;

(C) "T & R defendants" shall mean defendants Turpentine and Rosin Factors, Inc. and Pine Tree Products, Inc., or either of them;

(D) "Crude gum" shall mean the gum originally produced by scarifying living pine trees;

(E) "Rosin and turpentine" shall mean gum rosin and gum turpentine obtained by distillation of crude gum, or either of them, or any grade thereof;

(F) "Person" shall mean an individual, partnership, firm, association, corporation, cooperative or other legal or business entity.

IV

Defendant Exchange is ordered and directed to terminate, twelve months following entry of this Final Judgment, all activities of said defendant relating to rosin and turpentine, and is perpetually enjoined from thereafter conducting or engaging in, directly or indirectly, any such activities, unless the defendant Exchange moves this Court, within thirty days prior to the expiration of said twelve months, to amend this Section IV and, on such motion, the defendant establishes, and the Court finds, that the continued operation of the defendant Exchange is in the public interest. Any such motion by the defendant Exchange shall be upon reasonable notice to the Attorney General with an opportunity on the part of the latter to be heard.

V

(A) Defendant Exchange is ordered and directed forthwith to amend its rules, regulations and by-laws and to take such other steps as are necessary or appropriate to:

(1) Prevent any member, or any other person which sells or offers for sale any rosin or turpentine on the Exchange, from purchasing or bidding for, or causing to be purchased or bid for, directly or indirectly, any rosin or turpentine on the Exchange;

(2) Prevent any member or any other person engaged in, or having any affiliation whatsoever with any person engaged in, buying or processing crude gum or making first sales of the primary derivatives of crude gum, from purchasing or bidding for, or causing to be purchased or bid for, directly or indirectly, any rosin or turpentine on the Exchange;

(3) Require each member and each person authorized to buy or sell on the Exchange to report to an independent reporter or service designated by the United States Department of Agriculture such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service.

(B) In the event that any member, or any other person, authorized to buy or sell on the Exchange, refuses to comply with the reporting program referred to in subsection (A)(3) of this Section V, defendant Exchange is ordered and directed forthwith to expel such member from the Exchange, and to forbid that member or such other person, as the case may be, from utilizing, directly or indirectly, the facilities of the Exchange.

VI

Defendant Exchange is perpetually enjoined and restrained from posting, publishing or disseminating any price for rosin or turpentine, including, but not limited to, any price based on weighted averages or any price for a grade based on prices for other grades, which is not the sale price at which rosin and turpentine were in fact sold on the Exchange.

VII

Each of the Columbia defendants and T & R defendants is enjoined and restrained from:

(A) Refusing to comply with the request of an independent reporter or service designated by the United States Department of Agriculture for such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service;

(B) Causing, coercing or inducing, in any manner, any person to fail to comply or cooperate with the request of

an independent reporter or service designated by the United States Department of Agriculture for such information as to purchases and sales of crude gum and rosin and turpentine as may be requested by said reporter or service;

(C) Buying or bidding for, or causing to be bought or bid for, directly or indirectly, any rosin or turpentine on the defendant Exchange.

VIII

Each defendant is hereby ordered and directed to give notice of the terms of this Final Judgment to its officers, directors, members and subsidiaries, and to take such steps as are necessary to cause such persons to comply with said terms.

IX

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, and on reasonable notice to any defendant, be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment and, subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this Judgment any defendant, upon the written request of the Attorney General or an Assistant Attorney General, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Judgment. No information obtained by the

means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceeding for the purpose of securing compliance with this Final Judgment in which the United States is a party, or as otherwise required by law.

X.

Jurisdiction of this action is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and the punishment of violations thereof.

Dated: Oct. 18, 1951

F. M. SCARLETT
United States District Judge

We hereby consent to the entry of this Final Judgment.

For the Plaintiff:

H. G. MORRISON
Assistant Attorney General

SIGMUND TIMBERG
ALLEN A. DOBEY

J. SAXTON DANIEL
United States Attorney

WM. D. KILGORE, JR.
JOHN H. D. WIGGER

Attorneys for the United States

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No. 556

In the Supreme Court of the United States

OCTOBER TERM, 1960

TURPENTINE & ROSIN FACTORS, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

MOTION OF THE UNITED STATES TO AFFIRM

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Assistant Attorney General,
RICHARD A. SOLOMON,
JOEL E. HOFFMAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 556

TURPENTINE & ROSIN FACTORS, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

MOTION OF THE UNITED STATES TO AFFIRM

The United States moves, pursuant to paragraph 1(*e*) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This appeal grows out of a civil suit brought in 1951 by the United States under Section 1 of the Sherman Act against the Savannah Cotton & Naval Stores Exchange and two of its members (including appellant) and their subsidiaries (R. 2-12). Appellant was then, and is now, a dealer in naval stores (rosin and turpentine) produced from crude gum; it currently conducts extensive processing activities as well (R.

22-34). The complaint charged appellant and others with a conspiracy to fix, by means of wash sales between parent and subsidiary corporations, the naval stores prices posted on the defendant Exchange. The parties having consented to entry of a judgment without adjudication of the issues, a final consent decree was entered by the district court on October 18, 1951 (J.S. 7a-13a). The judgment, *inter alia*, required the appellant and other dealer defendants to provide such purchase and sale information as might be requested to an independent reporter designated by the United States Department of Agriculture (J.S. 10a-11a).

On May 4, 1960, appellant filed a petition to modify the 1951 consent decree on the ground that changed industry conditions have made the decree an instrument by which appellant's competitors secure an unfair competitive advantage (R. 26-31). The petition recited that the defendant Exchange has been dissolved and that all the defendants except appellant are no longer in existence; that appellant is the only member of the naval stores industry required to report sales and purchases; that, by reason of the reports, the details of appellant's business are available to competitors, whereas similar information as to competitors is unavailable to appellant; and that appellant thereby suffers disadvantage. Accordingly, the petition sought the removal of the reporting requirement from the consent decree.[1]

An evidentiary hearing was held on July 6, 1960 (R. 32-81), and briefs were filed by both parties. On

[1] Appellant's prayer for other relief was abandoned at the hearing on the petition (J.S. 3a).

July 21, 1960, the district court denied the petition on the ground that no evidence had been presented showing that the reporting provision resulted in such "grievous wrong" to petitioner as would justify removal of a requirement which is central to the effectiveness of the decree (J.S. 1a-6a). Petitioner appealed from this ruling on September 8, 1960.

ARGUMENT

This Court has set forth, *United States* v. *Swift & Company*, 286 U.S. 106, the narrow limits of judicial inquiry in passing upon petitions to modify provisions of antitrust consent decrees imposing obligations or restraints upon a party defendant. See, also, *United States* v. *Owens-Corning Fiberglas Corp.*, 178 F. Supp. 325 (N.D. Ohio); *United States* v. *International Boxing Club of New York, Inc.*, 178 F. Supp. 469 (S.D.N.Y.); *United States* v. *Swift & Company* (N.D. Ill.), decided December 12, 1960. And this Court has also made clear, *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562, that a district court's determination granting or denying modification of a consent order will be reversed only upon a showing of "an abuse of [the] power to modify." There is plainly no showing of an abuse of the district court's discretion in the instant case.

1. Appellant argues that since it is the sole remaining defendant subject to the mandatory reporting requirements of the consent decree, it is subjected to unfair competitive disadvantage. As the district court pointed out, this contention was supported solely by the *ipse dixit* of appellant's president, and "the rec-

ord does not reveal any fact from which can be measured the impact or effect upon [appellant's] volume of sales, profits or ability to compete flowing from the asserted fact that petitioner is the only naval stores dealer required by a judgment to report its purchases and sales information" (J.S. 4a). Indeed, it appears that while appellant is the only party required to submit reports, virtually the entire naval stores industry reports on a voluntary basis the same information required of appellant under the decree (R. 76-77). This material is merged for publication purposes with the material submitted by appellant and, as shown by the typical reports introduced at the hearing below (R. 82-84), and, as admitted by appellant's president (R. 51-52), it is impossible to determine from the published reports the activity of any one processor or to identify the terms of individual transactions. At the same time, appellant's reports to the reporting service are confidential and not subject to public inspection (R. 79).

In short, the "hardship" of which appellant complains has not been demonstrated. The district court was thus clearly correct in concluding that "in view of the record that is before me under this petition, this Court would not be warranted in decreeing a modification so as to strike therefrom the reporting provision applicable to petitioner" (J.S. 6a).

2. Appellant also challenges the propriety of the reporting requirement as an original matter. But such an attack obviously cannot succeed; having agreed to the requirement in the first instance, appellant cannot now be heard to argue that it was improperly included

in the decree. See *Swift & Company* v. *United States*, 276 U.S. 311, 324. In any event, the contention is without merit. The Government's complaint made clear that the nub of the problem was the need of the gum farmers for adequate and accurate price information concerning rosin and turpentine, and that the alleged conspiracy had had the effect of "misleading farmers with respect to the price of rosin and turpentine by posting as official market prices arbitrary quotations resulting from fictitious and non-competitive sales" (Complaint, Section V(c) (R. 10)). The importance of the reporting requirements of the decree from the standpoint of establishing an impartial source of market quotations is reflected in the statement of former Assistant Attorney General Morison that "under the judgment, the Savannah Exchange and the corporate defendants are required to cooperate with an independent reporting service designated by the United States Department of Agriculture, so that farmer and consumer alike may have access to authentic price information" (see Department of Justice Press Release of October 18, 1951, Appendix, *infra*, pp. 7-9). The public need for this information did not cease with the termination of activities by the Exchange in the naval stores field. This is particularly the case in view of the fact that since 1951 the number of processing plants subject to appellant's ownership or control has more than doubled (R. 65), while the total number of processing plants in the industry has declined by nearly one-third (R. 74). The court was thus fully warranted in finding that "a modification [of the decree] that would relinquish the reporting requirements of

the judgment therefore would go to the very heart of the prohibitions that were consented to in the judgment and would, in effect, virtually nullify a great portion of it" (J.S. 6a).

CONCLUSION

The order of the district court denying the petition to modify the 1951 consent decree should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Assistant Attorney General.

RICHARD A. SOLOMON,
JOEL E. HOFFMAN,
Attorneys.

DECEMBER, 1960.

APPENDIX

[For Immediate Release October 18, 1951]

DEPARTMENT OF JUSTICE

Attorney General J. Howard McGrath announced the entry today in the Federal District Court at Savannah, Georgia of an antitrust consent judgment terminating a civil action against the Savannah Cotton and Naval Stores Exchange, Inc., and the following seven corporations which deal in gum rosin and gum turpentine:

Columbia Naval Stores Company of Savannah, Georgia

Columbia Naval Stores Company of Fitzgerald, Georgia

Columbia Naval Stores Company of Hazelhurst, Georgia

Columbia Naval Stores Company of Jesup, Georgia

Columbia Naval Stores Company of Tifton, Georgia

Turpentine and Rosin Factors, Inc., Jacksonville, Florida

Pine Tree Products, Inc., Jacksonville, Florida

The judgment entered by the court requires the Savannah Exchange to terminate all of its activities relating to rosin and turpentine at the end of one year, unless the court at that time finds the continued operation of the Exchange to be in the public interest. The judgment also prohibits the Exchange from posting any price for rosin and turpentine other than actual sales

prices. This latter provision bars price quotations based on so-called "weighted averages" or on prices of other grades of rosin.

The complaint in this case, which was filed on October 11, 1950, pointed out that the prices paid to farmers for crude rosin and turpentine gum, and the prices charged to buyers of finished turpentine and rosin, were calculated on the basis of posted prices on the Savannah Exchange. The complaint charged that these posted prices were artificial and fictitious, because they were based on a very small volume of actual sales and represented in large part sales that took place between the affiliated defendant corporations. In order to insure that prices paid to farmers and prices charged to consumers should be based on a free competitive market, the judgment, among other things, enjoins the Savannah Exchange from permitting sellers of rosin and turpentine on the Exchange also to buy on the Exchange.

H. G. Morison, Assistant Attorney General in charge of the Antitrust Division, said: "In the view of the Department of Justice, the prices posted on the Savannah Exchange prior to the filing of this complaint were both fictitious and collusively arrived at. Such prices could not serve as a fair basis for determining either the prices to be paid to farmers for crude gum or to be paid by consumers for rosin and turpentine. We are satisfied that the judgment entered by the court today will do away with such fictitious price quotations in the turpentine and rosin industry. In addition, under the judgment, the Savannah Exchange and the corporate defendants are required to cooper-

ate with an independent reporting service designated by the United States Department of Agriculture, so that farmer and consumer alike may have access to authentic price information."

The judgment was prepared by Sigmund Timberg, Chief of the Judgment and Judgment Enforcement Section, and William D. Kilgore, Jr. of that Section. The case was prepared by Allen A. Dobey, Special Assistant to the Attorney General, and John H. D. Wigger, Trial Attorney.

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